No. 337

Supreme Court of the United States

October Term, 1948.

THEODORE DARR, JOHN DUDASIK, THOMAS FARACHER, NEIL GANNON, JAMES GRAHAM, KAY A. JACOBSEN, HARRY JACOBSON, ADOLPH LUTTECKE, JOSEPH B. MARTIN, ROBERT MARTIN, JOHN MOHLMAN, CARL NEWBERG, JOHN STROKOL, ARTHUR TAYLOR and JERRY J. ULIANO, suing in behalf of themselves and all other employees and former employees of respondent similarly situated,

Plaintiffs-Petitioners,

AGAINST

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Defendant-Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

STANLEY FAULKNER,
FREDERICK E. WEINBERG,
Counsel for Petitioners.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Theodore Darr, John Dudasik, Thomas Faracher, Neil Gannon, James Graham, Kay A. Jacobsen, Harry Jacobson, Adolph Luttecke, Joseph B. Martin, Robert Martin, John Mohlman, Carl Newberg, John Strokol, Arthur Taylor and Jerry J. Uliano, suing in behalf of themselves and all other employees and former employees of the respondent similarly situated, respectfully show:

Summary Statement of the Matter Involved.

On July 8, 1948, the United States Circuit Court of Appeals, Second Circuit, unanimously affirmed a judgment made and entered in the United States District Court, Southern District of New York, on October 10, 1947, dismissing the complaint upon the merits (—F. 2d—; 135 ff.).

The judgment in the United States District Court (pp. 129-130) was made and entered under the following circumstances:

Plaintiffs-Petitioners are elevator operators, elevator starters and general maintenance employees of a building owned and operated by the Defendant-Respondent in the premises at 34 Nassau Street, New York City, New York (pp. 114, 112). The building was substantially occupied and used by the Defendant-Respondent as its home office in conjunction with its preparation and subsequent distribution throughout the United States of policies of life insurance (pp. 112-114). The suit was instituted for the purpose of recovering additional compensation and liquidated damages by reason of the failure of the Defendant-Respondent to compensate Plaintiffs-Petitioners for their statutory overtime hours at the rate of 1½ times their regular hourly rates pursuant to the provisions of 29 U. S. C. A., Sections 207, 216(b), known as the Fair Labor Standards Act (pp. 4-7).

The cause was tried on March 5, 1947 before the Honorable Carroll C. Hincks, District Judge, without a jury (p. 2). The District Judge found that the Defendant-Respondent had been engaged at the premises in the production of goods for interstate commerce within the purview of the Fair Labor Standards Act and that it had failed to fulfill its obligations to the Plaintiffs-Petitioners under the Act with respect to the hours of statutory overtime employment (pp. 112-120). The opinion of the District Judge, dated April 30, 1947, was reported in 74 Fed. Supp. 80.

The Statute Involved.

Thereafter on May 14, 1947, and before the entry of judgment in accordance with the findings, conclusions and opinion of the District Judge hereinabove referred to, 29 U. S. C. A., Sections 251-262, known as the Portal-to-Portal Act of 1947, become effective. These provisions purport retroactively to cancel certain existent obligations of employers to their employees occasioned by past violations of the Fair Labor Standards Act, through the device of permitting such employers to plead and prove the existence of certain additional facts as defenses thereto. Thus, one of the sections of the new statute makes it a complete defense to all liability if the employer "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged" (id., Sec. 252). And another section would permit the trial court to disallow liquidated damages in any situation in which it found that the employer's violation of his statutory obligation had been made "in good faith" (id., Sec. 258).

The Opinions Below.

Thereupon and acting before the entry of judgment the Defendant-Respondent moved to reopen the case and for permission to plead and prove the new defenses purported to be accorded to it under the above provisions of the Portal-to-Portal Act (p. 121). The motion was granted on July 11, 1947 (p. 126). The parties appeared before the Honorable Carroll C. Hincks, District Judge, on September 12, 1947 and the court then received additional proof on behalf of the Defendant-Respondent pursuant to the provisions of the Portal-to-Portal Act of 1947 herein-

above referred to (id.). Thereafter the trial court made supplemental findings and conclusions. It held that the retroactive provisions of the Portal-to-Portal Act were constitutional as applied to this case and that the Defendant-Respondent had established a complete defense thereunder (pp. 126-8). Thereafter and on October 10, 1947 judgment was made and entered dismissing the complaint upon the merits.

On July 8, 1948 the United States Circuit Court of Appeals, Second Circuit (Swan, Augustus N. Hand and Chase, Circuit Judges) unanimously affirmed the said judgment (pp. 135, ff.).

Application has not been made for reargument, reconsideration or rehearing in respect of the decision of the Circuit Court of Appeals, Second Circuit.

Jurisdiction.

Jurisdiction to review this case upon writ of certiorari is expressly conferred upon this court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; Act of March 3, 1911, c. 231, Sec. 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938; U. S. C. Title 28, Section 347).

The Questions Presented.

The over-all question presented is whether the provisions of 29 U. S. C. A., Sections 258, 260 (also known as Sections 9 and 11 of the Portal-to-Portal Act) may constitutionally be applied to claims to recover money which had been due before these new statutes became effective.

It is the petitioners' position that these employees' claims to recover money from their employers, having come into existence before the provisions of the Portal-to-Portal Act became law, were indestructible thereby; that such claims constituted valuable property rights within the purview of the Fifth Amendment to the Federal

Constitution and were protected against an uncompensated Congressional expropriation.

The vice of retroactivity is aggravated by another feature. By conferring upon a miscellany of informal and *de facto* boards, without the guidance of adequate standards, the power to relieve individuals from the consequence of their violations of a prior Act of Congress, and by applying that result retroactively, to representations which may have been made without investigation, notice or opportunity to present facts—and which may have been casual rather than *ex cathedra*—the Congress has violated the constitutional prohibition against the delegation of legislative power.

The unconstitutionality of applying these sections of the Portal-to-Portal Act retroactively for the purpose of extinguishing claims theretofore due was consistently urged by the Plaintiffs-Petitioners at every opportunity in both the lower courts (upon the motion of Defendant-Respondent to reopen the case and for permission to plead and prove defenses under the provisions of the Portal-to-Portal Act, pp. 121-2; at the supplemental trial conducted by the District Judge after its granting of the motion, p. 128; and upon the appeal in the Circuit Court of Appeals, pp. 135, ff.).

Reasons for Granting the Writ.

*This case presents an important Federal question—the constitutionality of applying the provisions of the Portal-to-Portal Act retroactively so as to extinguish claims to recover money which had been due before the new statute became effective—which has not been, but should be, settled by this Court.**

*It will be noted that the question of the power of Congress retroactively to redefine the scope of compensable working time (the so-called "porta-to-portal" feature) is not presented. The sole question here presented is as to the constitutionality of the attempted cancellation of claims which had concededly arisen out of the employer's failure to make adequate compensation for unquestioned hours of work for which some compensation was paid.

The decision of the Circuit Court of Appeals, Second Circuit, affirming the judgment in the District Court violated the doctrine of this Court as stated and applied in *Ettor* v. *Tacoma*, 228 U. S. 148, 156. While the statute in the *Ettor* case had been a state statute and not, as here, an Act of Congress, this Court subsequently intimated that that was an irrelevant matter so far as the decision was concerned: that the *Ettor* decision stood for "the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed" (per Hughes, *C. J.*, in *Graham* v. *Goodcell*, 282 U. S. 409, 426).

The doctrine of the decision of the Circuit Court of Appeals would require review by this Court even if the interests presently and immediately affected were insignificant. For it involves a revolutionary departure from a fundamental principle of constitutional law. There can be no distinction, in fact or in logic, between the rights of an owner of land or movable goods and the rights of an owner of a chose in action, whether consisting of a deposit balance with a banking institution or a simple claim to recover money from a debtor. Accordingly, the constitutional protection which has been accorded to the one must be extended with equal solicitude to the other. The undesirable consequences of any attempt to withhold the property right protection from the chose in action are many. Thus, unless the doctrine of the Circuit Court of Appeals in this case be disapproved and replaced by the correct one, money claims may frequently become the occasions of stampedes; otherwise the debtor, confiding his position to a lobby rather than to a lawyer, may successfully obtain a cancellation of an existent obligation.

There is further vice in the manner in which Congress has violated the constitutional prohibition against the delegation of legislative power, in conferring upon undesignated and unlimited Federal agencies power not only to re-

lieve employers of the consequence of their own violations of a prior Act of Congress, but to do so by giving retroactive effect to the casual and informal representations of the innumerable officials, employees and representatives of such agencies, without notice, without hearing, and without adequate guidance. Cf. *Schechter* v. *U. S.*, 295 U. S. 495.

Literally tens of thousands of employees have claims which will be wiped out in the event that the doctrine of the Circuit Court of Appeals in this case is the law. Ever since the enactment of the Fair Labor Standards Act of 1938 employers have attempted circumvention of its provisions through the device of the artificial formula for calculating regular hourly rate as well as in a number of other fashions. While many of the cases based on such practices have come to trial, there are tens of thousands of claims which have not yet been litigated in view of the beliefs of the employees and their attorneys that it would be expedient and practicable to await decisions in test cases. The result of the retroactive debt cancellation effected by the decision of the Circuit Court of Appeals in this case would be to punish these claimants by an expropriation which would be at once undeserved, unanticipated and unjust.

PRAYER FOR WRIT.

Wherefore your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court to the United States Court of Appeals for the Second Circuit commanding said last named Court to certify and send to this Honorable Court a full and complete transcript of the record of all proceedings in the within cause and to stand to and abide by such order and direction as to your Honors shall seem meet and the circumstances of the case require and that your petitioners may have such other and further relief or remedy in the premises as to this Court may seem proper.

Dated, New York, September 30, 1948.

STANLEY FAULKNER,
FREDERICK E. WEINBERG,
Counsel for Petitioners.